Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-701

In the Supreme Court of the United States

OCTOBER TERM, 1986

JANET COOPER,

Appellant,

v.

EUGENE SCHOOL DISTRICT NO. 4J and VERNE A. DUNCAN, SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF OREGON,

Respondents.

On Appeal from the Supreme Court of the State of Oregon

MOTION TO AFFIRM

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
MARGARET E. RABIN
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent Verne A. Duncan, Superintendent of Public Instruction for the State of Oregon

*BRUCE E. SMITH
JACQUELYN ROMM
Cass, Scott, Woods & Smith
200 South Park Building
101 East Broadway
Eugene, Oregon 97401
Phone: (503) 687-1515
Counsel for Respondent Eugene School District No. 4J

*Counsels of Record

app

TABLE OF CONTENTS

Page

Motion to Affirm 1

Argument

I. The State of Oregon concedes that this Court has jurisdiction to decide this appeal and the appeal presents a federal question 1

II. This case does not warrant full briefing and argument 2

Conclusion 6

TABLE OF AUTHORITIES

Page

Cases Cited

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 6

Board of Education v. Barnette, 319 U.S. 624 (1943) 6

Cooper v. Eugene School District No. 4J, et al., 301 Or. 358, 723 P.2d 298 (1986) 1-2,5-6

Engel v. Vitale, 370 U.S. 421 (1962) 5,6

Kolender v. Lawson, 461 U.S. 352 (1983) 1

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 5

Lynch v. Donnelly, 465 U.S. 668 (1984) 5

McCollum v. Board of Education, 333 U.S. 203 (1948) 5,6

Stone v. Graham, 449 U.S. 39 (1980) 4,5

Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981) 3

Tilton v. Richardson, 403 U.S. 672 (1971) 6

Wainwright v. Stone, 414 U.S. 21 (1973) 1

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6

Statutory Provisions

28 U.S.C. § 1257(2) 1

42 U.S.C. § 2000e-2(a) 2

Or. Rev. Stat. § 342.650 (1985) 1

Or. Rev. Stat. § 342.655 (1985) 1

Other Authorities

Tribe, AMERICAN CONSTITUTIONAL LAW (1978) 3

U.S. Supreme Court Rule 16.1(d) 1

MOTION TO AFFIRM

Pursuant to Rule 16.1(d), respondents Verne A. Duncan, Superintendent of Public Instruction for the State of Oregon, and Eugene School District No. 4J,[1] move to affirm summarily the judgment and opinion of the Oregon Supreme Court in *Cooper v. Eugene School District No. 4J, et al.*, 301 Or. 358, 723 P.2d 298 (1986). The judgment should be affirmed because the case does not merit this Court's plenary review.

The Oregon court reached the correct result in this case when it concluded that the statutes prohibiting public teachers' religious dress in the classroom are consistent with the religious guarantees of the federal charter. Although the lower court's discussion of the United States Constitution is conclusory, the reasoning of the opinion is substantially correct. This Court has never addressed the precise question presented, but the holding below is the logical extension of this Court's prior holdings. These considerations favor summary affirmance rather than plenary review.

ARGUMENT

I. The State of Oregon concedes that this Court has jurisdiction to decide this appeal and the appeal presents a federal question.

28 U.S.C. § 1257(2) gives this Court jurisdiction to review the Oregon Supreme Court's final judgment. The Oregon court held that Or. Rev. Stat. §§ 342.650 and 342.655 (1985), as interpreted by it[2] and applied to appellant, are consistent with the religion clauses of both the state and federal constitu-

---

[1] For brevity, this motion refers to respondents Verne A. Duncan and Eugene School District No. 4J as the State of Oregon.

[2] In reviewing a state statute, this Court " 'must take the statute as though it read precisely as the highest court of the State has interpreted it.' " *Kolender v. Lawson*, 461 U.S. 352, 355 n. 4 (1983) (vagueness challenge to a state statute) (quoting *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973)).

tions.[3] 301 Or. at 381-82, 723 P.2d at 313-14. Appellant's assertion that "[t]he opinion of the Oregon Supreme Court purports to rest merely on state constitutional grounds," (Jur. St. at 19), is not accurate. Appellant directly raised a free exercise claim under the federal first amendment and the Oregon Supreme Court expressly reached the question. 301 Or. at 381-82, 723 P.2d at 313. Admittedly, the bulk of the Oregon court's analysis focused on the requirements of the state constitution, but the court passed on a squarely presented federal question when it ruled that the statutes were consistent with the federal first amendment. *Id.*

A ruling by this Court that Oregon's statutes are inconsistent with the federal constitution necessarily would require a reversal of the judgment. The judgment, therefore, is not supported by an independent and adequate state ground.

II. This case does not warrant full briefing and argument.

The jurisdictional statement offers slender support for its claim that full review is necessary. In support of plenary review, appellant asserts that her important interest arises in a delicate context and identifies two "issues" that are, in actuality, not present. More should be required, but she does not offer more. In fact, the jurisdictional statement fails to acknowledge that the lower court's decision is wholly consistent with this Court's prior holdings concerning religion in the public schools.

---

[3] In the lower courts, appellant challenged the state statutes both "facially" and "as applied." She contended that the statutes violated rights conferred by the state constitution, the Free Exercise Clause, the Due Process Clause, the Equal Protection Clause, and 42 U.S.C. § 2000e-2(a). She asserted that the state statutes were both "overbroad" and "vague." The Oregon Supreme Court declined to "pursue" her claim of violation of Title VII, 301 Or. at 367-68 n. 9, 723 P.2d at 305, n. 9 and did not address her equal protection and vagueness challenges.

The state agrees that both the state and individual interests involved in this case are significant and sensitive. On one hand, this case involves a public school teacher's freedom to practice religion by wearing religious costume in accordance with the dictates of her sincerely held religious beliefs. This case also involves, however, the state's authority to circumscribe that liberty in order to preserve the religious neutrality of the school and to prevent burdening the religious freedom of the pupils. The Oregon Supreme Court correctly assessed these weighty interests.

Appellant points to the manifest tension between the religion clauses of the federal constitution that is central to this case. This tension has been acknowledged elsewhere, *e.g.*, *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting); L. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-2 at 815 (1978), and unquestionably is present in this case. The objective of the Oregon statutes challenged here is religious neutrality in the public schools. In effect, the statutes embody and effectuate the values of the Establishment Clause. Admittedly, by limiting religious dress in public schools, the Oregon statutes affect Cooper's constitutionally protected interest in practicing her religion. However, as a public school teacher, Cooper is a government official. To her students, she is an authority figure. Her personal religious liberty cannot entitle her to convey an implied government endorsement of her religious convictions. It may be difficult to envision a context in which the friction between free exercise and establishment values is more obvious. It is equally obvious, however, that the Oregon court correctly resolved the conflict by concluding that the state's interest in avoiding the appearance of endorsing religion in the public schools must prevail. Plenary review is not necessary to determine which competing religious liberty should take precedence in this context.

Two of the issues identified in the jurisdictional statement are illusory and vanish upon closer examination. Appellant asserts that "this case raises the question of whether a state constitution may add to or detract from" the protections conferred by the Free Exercise and Establishment Clauses. (Jur. St. at 14). Her assertion is incorrect. There is nothing in the Oregon court's opinion that suggests that the requirements of the Oregon Constitution in any way altered the court's analysis of the result under the United States Constitution. Rather, the court viewed the state and federal analyses as parallel, holding simply that the religious guarantees of both the state and federal constitutions were not violated by the state statutes that prohibit religious dress in the public school classroom.

Similarly, appellant states that "the question is raised whether the state may legislate in this area at all." (Jur. St. at 13). Nothing prevents a state from regulating behavior in a manner that is consistent with the federal constitution. Thus, if, for example, a state legislature chooses statutorily to prohibit public school teachers from leading students in a recitation of the "ten commandments" and sanctions a violation with loss of a teacher's certification, surely that is lawful. *See Stone v. Graham*, 449 U.S. 39 (1980). The legislation at issue here is consistent with the Establishment and Free Exercise Clauses and serves the additional state interest of regulating the licensing of teachers.

The jurisdictional statement is bereft of any showing that the lower courts require guidance in this area. There is no assertion that the problem is pervasive. Also absent is any contention that the lower court's ruling (that the statutes are consistent with the first amendment) conflicts with any of this Court's prior rulings. Appellant mentions no troubling division among the state courts or federal courts concerning the propriety of barring religious dress from the public school.

Finally, appellant wholly ignores this Court's consistent affirmation of the principles, set out below, that form the heart of the Oregon court's decision. This Court's opinions reveal that the public schools play a unique and sensitive role in our society. *See generally Engel v. Vitale*, 370 U.S. 421 (1962); *Stone v. Graham*, 449 U.S. 39 (1980). As Justice Frankfurter stated,

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

McCollum v. Board of Education, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). The religion clauses prohibit even the "mere appearance" of a union of church and state, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982), and the state's apparent endorsement of any religion, *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

These principles, which demonstrate the propriety of the state statutes, were properly articulated and applied by the lower court, as follows:

> Parents and lawmakers may and do assume that the hours, days, and years spent in school are the time and the place when a young person is most impressionable by the expressed and implicit orthodoxies of the adult community and most sensitive to being perceived as different from the majority of his or her peers; famous constitutional cases have involved this socializing rather than intellectual function of the schools. In excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment, laws like ORS 342.650 respect and contribute to the child's right to the free exercise and enjoyment of its religious opinions or heritage, untroubled by being out of step with those of the teacher.

301 Or. at 376, 723 P.2d at 310 (footnote omitted).[4] The Oregon court's analysis is appropriate and the result it reached is correct.

CONCLUSION

Religious dress brings religion into the secular classroom before impressionable students. With the introduction of religion into the classroom comes the appearance that the state endorses the teacher's religion, the opportunity for the teacher to advance her religion, and the specter of religious divisiveness. The special relationship created by the teacher's authority over the pupils requires that public school teachers not wear religious dress. The Oregon court's opinion should be affirmed.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
MARGARET E. RABIN
Assistant Attorney General
Counsel for Respondent
Verne A. Duncan, Superintendent of Public Instruction for the State of Oregon
BRUCE E. SMITH
JACQUELYN ROMM
Cass, Scott, Woods & Smith
Counsel for Respondent
Eugene School District No. 4J

---

[4] The Oregon court cited *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971), (Burger, C.J., plurality opinion).